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NO. 80-590

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

GULF OFFSHORE COMPANY,
A DIVISION OF THE POOL COMPANY,
Petitioner,

v.

MOBIL OIL CORPORATION, ET AL.,
Respondents.

On Petition For Writ of Certiorari To The Court of Civil Appeals For The Fourteenth Supreme Judicial District of Texas

BRIEF OF RESPONDENT STEVEN GAEDECKE IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW[1]

Gaedecke, being dissatisfied with the presentation of petitioner, submits the following:

1. Does the original 1953 Outer Continental Shelf Lands Act ("Lands Act"), 43 U.S.C. § 1333(b), granting United States district courts *"original jurisdiction"* of controversies arising under the Act, or the "Amendments of 1978" thereto (43 U.S.C. § 1349(b)(1))[2] granting United States district courts *"jurisdiction"* of controversies arising under the Act, give federal courts EXCLUSIVE jurisdiction?

2. Does this court have *jurisdiction* to consider the exclusion of federal income taxes in computing damages when petitioner *failed to comply with Texas procedure* in requesting the Texas district court, where the case was tried, to instruct the jury that any damage award to plaintiff Gaedecke is not income to him within the meaning of the federal income tax law?

3. Should the holding of this court in *Norfolk and Western Railway Company v. Liepelt,* 100 S.Ct. 755 (February 19, 1980), *a Federal Employer's Liability Act ("FELA") wrongful death case* approving a jury instruction not to consider federal income taxes in fixing its award, be applied to this *common law* personal injury case?

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1. Parties in the court whose judgment is sought to be reviewed are: Gulf Offshore Company, a Division of the Pool Company, Mobil Oil Corporation and Steven Gaedecke. They are referred to by abbreviated name—"Gulf," "Mobil," "Gaedecke."

2. To be cited as the "Outer Continental Shelf Lands Act Amendments of 1978." Sec. 1, Pub. L. 95-372, 92 Stat. 629.

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INTRODUCTION

Respondent Steven Gaedecke ("Gaedecke"), plaintiff in the trial court and a party to the proceeding in the

court whose judgment is sought to be reviewed (S.Ct. R. 19.6 (1980)) requests this Court to deny the petition for certiorari filed herein by petitioner Gulf Offshore Company, a Division of the Pool Company ("Gulf").

JURISDICTION AND A PARTIAL OBJECTION THERETO

1. Gaedecke concedes that this court has jurisdiction under 28 U.S.C. § 1257(3) to consider the question of exclusive jurisdiction, *vel non*, of the United States district courts under the original 1953 Lands Act (43 U.S.C. § 1333(b)) and the "Amendments of 1978" thereto (43 U.S.C. § 1349(b)(1)).

2. He denies that this court has jurisdiction to consider the state trial court's failure to instruct the jury to exclude federal income taxes in computing damages (Petitioner's point II, Pet. for Cert., p. 1[illegible] et seq.) because, even if this is a federal question, petitioner did not present the matter in the state trial court in accordance with the Texas Rules of Civil Procedure. To maintain jurisdiction on the ground that a state court has denied a federal right that right must be asserted according to state practice and procedure. *Mutual Life Ins. Co. v. McGrew*, 188 U.S. 291, 308, 23 S.Ct. 375, 378, 47 L.Ed. 480 (1903), *Wolfe v. State of North Carolina*, 364 U.S. 177, 195, 80 S.Ct. 1482, 1492, 4 L.Ed.2d 1650 (1960). Failure to do so "is an adequate state ground for a decision below." *Edelman v. People of State of California*, 344 U.S. 357, 359, 73 S.Ct. 293, 295 (1953). The following Points A and B were raised by the Texas Supreme Court by Gaedecke in opposing Gulf's application for writ of error.

A. As the record fails to show that the state trial judge acted on petitioner's requested instruction "C", directing the jury not to consider federal income taxes in awarding damages, any error was waived and presents nothing for review.

Tex. R. Civ. P. 276 (Appendix A) provides that when a requested instruction is refused by the trial judge, "he shall endorse thereon 'refused' and sign the same officially." Gulf's requested Instruction No. C *does not show it was ever presented to or acted on by the trial judge.* It was therefore waived and presents nothing for review. *Newman v. Dehli Gas Pipeline Co.*, 517 S.W.2d 635, 636 (Tex. Civ. App.—Tyler 1974, no writ); 3 McDONALD, TEXAS CIVIL PRACTICE § 12.36.1, n.59, p. 431 (rev. ed. 1970).

It is true that the trial judge *signed* Gulf's requested Instruction A, but did not endorse requested Instruction C as to federal income taxes *"Refused"* (Appendix B). His naked signature on A is meaningless as to C, even assuming requested Instructions A, B and C were filed together.

B. As petitioner presented no evidence whatsoever as to federal income taxes it was not entitled to a jury instruction on the subject.

It is uniformly held by the Texas courts that jury instructions should not be given as to any matter not raised by the evidence. *Missouri K. & T. Ry. Co. v. Strafford,* 31 S.W. 319 (Tex. 1895); *Houston East & West Texas Ry. Co. v. Matthews,* 12 S.W.2d 163, 164 (Tex. Comm.

App., 1929, holding approved); *Gonzales v. Texas Department of Human Resources,* 581 S.W.2d 522, 526 (Tex. Civ. App.—Corpus Christi 1979, writ ref'd n.r.e., cert. den. 100 S.Ct. 1079); HODGES, SPECIAL ISSUE SUBMISSION IN TEXAS 34 (1959).

Petitioner does not assert that any evidence was introduced regarding federal income taxes, and none was in fact introduced.

With no evidence there was simply no legal basis to submit requested Instruction No. C under Texas procedure. Jury issues, even in a case based on a Federal statute tried in a state court, must be given in accordance "with local rules of practice and procedure." *Chesapeake and Ohio Railway Company v. De Atley,* 241 U.S. 310, 317, 36 S.Ct. 564, 60 L.Ed. 1016 (1916).

STATUTES WHICH THE CASE INVOLVES

Petitioner quotes *only* § 1333(a) and (b) of Title 43 of the United States Code, a part of the original 1953 Lands Act (67 Stat. 462, c345, § 4) as being involved in this case. (Pet. for Cert., p. 2-4).

This case also involves part of the "Outer Continental Shelf Lands Act Amendments of 1978" (§ 1, Pub. L. 95-372, 92 Stat. 629), viz.

43 U.S.C. § 1349(b)(1) specifically pertaining to jurisdiction of the United States District Courts which provides as follows:

> (b)(1) Except as provided in subsection (c) of this section,[2a] the district courts of the United States

2a. Review of actions of the Secretary of the Interior.

shall have *jurisdiction* of cases and controversies arising out of, or in connection with (A) any operation conducted on the outer Continental Shelf which involves exploration, development, or production of the minerals, of the subsoil and seabed of the outer Continental Shelf, or which involves rights to such minerals, or (B) the cancellation, suspension, or termination of a lease or permit under this subchapter. Proceedings with respect to any such case or controversy may be instituted in the judicial district in which any defendant resides or may be found, or in the judicial district of the State nearest the place the cause of action arose (Emphasis ours).

Section 1333 provides that:

(2)(A) To the extent that they are applicable and not inconsistent with this subchapter or with other Federal laws and regulations of the Secretary now in effect or hereafter adopted, the civil and criminal laws of each adjacent State, now in effect or hereafter adopted, amended, or repealed are declared to be the law of the United States for that portion of the subsoil and seabed of the outer Continental Shelf, and artificial islands and fixed structures erected thereon, which would be within the area of the State if its boundaries were extended seaward to the outer margin of the outer Continental Shelf, and the President shall determine and publish in the Federal Register such projected lines extending seaward and defining each such area. All of such applicable laws shall be administered and enforced by the appropriate officers and courts of the United States. State taxation laws shall not apply to the outer Continental Shelf.

STATEMENT OF THE CASE

Gaedecke, being dissatisfied with the presentation of petitioner, submits the following succinct statement of the case:

This common law negligence action for personal injury was filed on November 20, 1975 by Gaedecke as plaintiff in the 129th District Court of Harris County, Texas against Mobil for personal injuries he sustained on September 22, 1975 aboard a boat provided by Mobil following his negligent emergency evacuation from a fixed drilling platform owned by Mobil. The platform was located in the Gulf of Mexico off the Louisiana coast.

Gaedecke was an employee of Gulf. Mobil, in turn, sued Gulf as a third party defendant for contractural indemnity.

Trial, which began on November 29, 1978, was to a jury and based on answers to special issues finding Mobil guilty of negligence, causation and damages, the district court on December 18, 1978, rendered judgment for Gaedecke against Mobil and granted Mobil indemnity from Gulf for all sums it was required to pay under the judgment (Pet. for Cert., Appendix A-22).

Gulf appealed to the Texas Court of Civil Appeals, which, on December 12, 1979 affirmed the judgment of the District Court (Pet. for Cert., Appendix A-1). Gulf filed an application for a writ of error in the Texas Supreme Court, which was refused "no reversible error" on June 18, 1980 (*Id.*, Appendix A-20). Gulf's motion for rehearing in that court was overruled on July 16, 1980 (*Id.*, Appendix A-21).

SUMMARY OF THE ARGUMENT

I.

State and Federal Courts Have Concurrent Jurisdiction Under the Lands Act

1. In federal courts, in contrast to state courts of general jurisdiction, a cause is without jurisdiction until the contrary appears. The original 1953 Lands Act gives federal courts *"original jurisdiction"* and the 1978 Amendments thereto gives them *"jurisdiction"* of controversies under the Act. Neither statute even suggests *"exclusive jurisdiction"* in the federal courts.

2. As this Court cannot supply what Congress omits, the word "exclusive," it follows that under the original 1953 Act and the 1978 Amendments, state and federal courts have concurrent jurisdiction of controversies under the Lands Act. Further, assuming arguendo that the original 1953 Act granted "exclusive" jurisdiction, this was changed by the 1978 Amendments which were in force when this case was tried in the district court, and decided by the Texas appellate courts. Statutory changes pendente lite are honored by this court.

3. The Act as a whole does not give federal courts jurisdiction "by fair implication [sic]."

II.

Norfolk & Western Ry. Co. v. Liepelt Is Not Applicable To The Case At Bar

1. This case is a common law negligence action for personal injuries brought by Gaedecke in a *Texas* District Court for injuries sustained while being evacuated from a drilling platform ("fixed structure") off the coast of *Louisiana*. Under both the original 1953 Lands Act and the 1978 Amendments thereto Louisiana law was applicable as "surrogate federal law," yet there was no proof of Louisiana law as to either negligence or damages.

2. *Liepelt*, which approved a jury instruction not to consider federal income taxes in its award, was a *statutory* FELA wrongful death case in which damages are completely different from those awarded in a *common law personal injury case*. Further, *Liepelt*, as well as Texas procedure, requires the introduction of *evidence* regarding federal income taxes as a prerequisite to such an instruction. Petitioner provided no evidence whatsoever as to federal income taxes.

3. *Liepelt*, being a federal statutory case, can be retroactively applied in FELA cases only.

ARGUMENT

WHY THIS CAUSE SHOULD NOT BE REVIEWED BY THIS COURT

I.

THE STATE COURTS HAD SUBJECT MATTER JURISDICTION OF THIS CASE, AND EXCLUSIVE JURISDICTION IS NOT IN THE FEDERAL COURTS

1. The 1953 Outer Continental Shelf Lands Act.

The original 1953 Outer Continental Shelf Lands Act (43 U.S.C. § 1333(b)), says "The United States district courts shall have *original jurisdiction* of controversies arising under this Act" (emphasis ours). Nowhere does the word *exclusive* appear.[3]

Neither this Court or any Federal circuit court of appeals have passed on the "exclusive" jurisdiction question raised by petitioner. Gulf supports its position with an annotation in 30 A.L.R. Fed. 535 (1976), three federal district court cases (two by Judge Alvin B. Rubin in Louisiana and one by Judge Ross N. Sterling in Texas) and the divided opinion of a Louisiana *intermediate* appellate court[3a] (Pet. for Cert., p. 8-9, 13-14).

The decisions of Judge Rubin and Judge Sterling are hardly persuasive as the Texas Court of Civil Appeals in

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3. This is the way the Act read on the date Gaedecke's accident occurred, the date suit was filed and the date Mobil sued Gulf (Pet. for Cert., p. 10). As we shall see the Act was amended on September 18, 1978, omitting the word "original," thus further excluding any idea of *exclusive* jurisdiction.

3a. Not "The decision of the court of last resort in Louisiana." as counsel says in his Petition (Pet. for Cert., p. 8).

this case aptly points out (594 S.W.2d at 501, 502; Pet. for Cert., Appendix A-5-7). It preferred to follow the dissent of Judge Landry in *Gravois v. Travelers Indemnity Company,* 173 So.2d 550 (La. Ct. App., writ ref'd, 175 So. 2d 301 (1965) that appears at 173 So.2d 556-563 (594 S.W.2d at 502; Pet. for Cert., Appendix A-7).

In *Gravois* the question of jurisdiction was treated in "an offhanded manner" (173 So.2d 553) with the result that the majority fell into constitutional error and held (173 So.2d 556):

> Had Congress intended to grant concurrent jurisdiction to the State Courts it would have so specified in this Act as they did in the Jones Act. The failure to do so shows their intention to *retain* [sic] jurisdiction in the United States Courts (emphasis ours).

On the contrary, this Court held long ago that in federal courts, in contrast to state courts of general jurisdiction, "A cause is without its jurisdiction, until the contrary appears." *Turner v. Bank of North America,* 4 Dall. 8, 1 L.Ed. 715, 719 (1799).

What Gulf would have this court do is to add the word "exclusive" to 43 U.S.C. § 1333(b) and make it read "*exclusive* original jurisdiction." But this Court holds that it may not by construction insert words in a statute: what Congress omits, it cannot supply. *62 Cases, Etc. v. United States,* 71 S.Ct. 515, 340 U.S. 593, 596, 95 L.Ed. 566 (1951).

Congress expresses its purpose by words. Thus, if it had intended for the federal district courts to have exclusive jurisdiction under the Lands Act, it would have said so,

just as it did in the *Deep Seabed Hard Mineral Resources Act* of June 28, 1980, (94 Stat. 553)—"The district courts of the United States shall have *exclusive* jurisdiction over any case or controversy arising under the provisions of this Act." (94 Stat. at 580). (Emphasis ours).

2. The Outer Continental Shelf Lands Act Amendments of 1978

On September 18, 1978, Congress passed the Outer Continental Shelf Lands Act Amendments of 1978 (P.L. 95-372, 92 Stat. 629).

Former subsection (b) of 43 U.S.C. § 1333(b), giving United States district courts "original jurisdiction" of controversies arising under the Act was stricken. A *new* provision for jurisdiction of United States district courts was added in a *new* section, (92 Stat. 657, 658, § 23(b)(1)), and codified as 43 U.S.C. § 1349(b)(1). See 43 U.S.C.A. § 1333, 1980 Supp. "1978 Amendment," p. 81. The new law provides for *"jurisdiction,"* not *"original* jurisdiction," of United States district courts. Again, there is no mention of "exclusive jurisdiction."

In *Bruner v. United States,* 343 U.S. 112, 72 S.Ct. 581, 584, 96 L.Ed. 786 (1952), this court said (343 U.S. at 116-117):

> It is clear, that when the jurisdiction of a cause depends upon a statute, the repeal of the statute takes away the jurisdiction.
>
> * * * *
>
> This rule—that when a law conferring jurisdiction is repealed without any reservation as to pending

cases, all cases fall with the law—has been adhered to consistently by this Court.

The result is that 43 U.S.C. § 1333(b), the former 1953 Lands Act jurisdiction section, was replaced by the enactment of an entirely *new* jurisdiction section, 43 U.S.C. § 1349(b)(1), on *September 18, 1978* during the pendency of this suit. The jurisdiction of the trial court is therefore properly determined as of the date its judgment in this case on December 18, 1978, (Pet. for Cert., Appendix A-22), *Merchants Insurance Co. v. Ritchie,* 5 Wall. 541, 18 L.Ed. 540, 541 (1866). Also the Court of Civil Appeals and the Texas Supreme Court were obliged to apply the law in effect at the time they subsequently rendered their respective decisions. *Thorpe v. Housing Authority of City of Durham,* 393 U.S. 268, 281, 89 S.Ct. 518, 526 (1969).

If there was any exclusive federal district court jurisdiction under the original 1953 Lands Act, when Congress changed its grant of "original jurisdiction" to "jurisdiction" pendente lite any implied "exclusive" jurisdiction ended.

Congress must have intended changes by the new and limited grant of "jurisdiction" to the federal district courts by its 1978 Amendments. The jurisdictional section in the former law, 43 U.S.C. § 1333(b), had become controversial, i.e. did the language giving the U.S. district courts "original jurisdiction" mean to confer upon them "*exclusive*" original jurisdiction"? (See discussion under subhead 1, supra). It thus becomes significant that Congress in the 1978 Amendments rewrote the jurisdictional section of the 1953 Act, moved that entire section from 43

U.S.C. 1333(b) to a completely new section, 43 U.S.C. § 1349(b)(1), and in the process dropped from the grant of jurisdiction the word "original." This action by Congress signals a clear change in the law.

This Court has held that an omission from an amendatory act of words contained in an original act raises a presumption that a change in meaning or purpose was intended. *Pirie v. Chicago Title and Trust Co.*, 182 U.S. 438, 21 S.Ct. 906, 45 L.Ed. 1171 (1900). In *Sun Ship, Inc. v. Pennsylvania*, 100 S.Ct. 2432, 2437 (1980), this Court said:

> It would be a *tour de force* of statutory misinterpretation to treat the *removal* of phrasing that arguably establishes exclusive jurisdiction as manifesting the intent to command such exclusivity.

3. Concurrent Jurisdiction

The mere grant of jurisdiction to a lower federal court does not imply a denial of historic state court jurisdiction, or give the federal court *exclusive* jurisdiction. *Chaflin v. Houseman*, 93 U.S. 130, 23 L.Ed. 833 (1876). Even when state court litigation is based upon a federal statute, this Court has held—under the principle of strictly construing congressional grants of jurisdiction to the lower federal courts—that state courts have concurrent jurisdiction with the lower federal courts. *Chaflin v. Houseman, supra; Testa v. Katt*, 330 U.S. 386, 67 S.Ct. 810, 91 L.Ed. 967 (1947).

The rule in *Chaflin* was followed in *Charles Dowd Box Co. v. Courtney*, 82 S.Ct. 519, 368 U.S. 502, 7 L.Ed.2d 483 (1962) where the court considered a federal statute that did "not state or even suggest that such [federal]

jurisdiction be exclusive" (368 U.S. at 506). The Supreme Judicial Court of Massachusetts had held it had concurrent jurisdiction:

> We do not accept the contention that State courts are without jurisdiction. The statute does not so declare. The conferring of jurisdiction in actions at law upon the appropriate District Courts of the United States is not, in and of itself, a deprivation of an existing jurisdiction both at law and in equity in State Courts.
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> * * * *
>
> In the absence of a clear holding by the Supreme Court of the United States that Federal jurisdiction has been made exclusive, we shall not make what would be tantamount to an abdication of the hitherto undoubted jurisdiction of our own courts. (Quoted at 368 U.S. 505).

This Court agreed and affirmed the Massachusetts court holding that it had jurisdiction (368 U.S. at 506).

4. No Exclusivity From "Fair Implication" From The Act As A Whole

Petitioner argues that *"by fair implication"* [sic] the Lands Act pre-empts state court jurisdiction in "the Lands Area," (Pet. for Cert., p. 10); or more broadly "cases and controversies arising out of or in connection with operations conducted on the Outer Continental Shelf" (*Id.*, p. 12); then more narrowly, "to cases such as the one at bar" (*Id.*, p. 13); and finally, most narrowly, only "artificial islands" (*Id.*, p. 15).

"But federal occupation of a field will not be lightly inferred." TRIBE, AMERICAN CONSTITUTIONAL LAW § 6-25, p. 384; 15 Am. Jur. 2d *Commerce* § 34, n.62, p. 363.

> Federal legislation, on the whole, has been conceived and drafted on an *ad hoc* basis to accomplish limited objectives. It builds upon legal relationships established by the states, altering or supplanting them only so far as necessary for the special purpose. Congress acts, in short, against the background of the total *corpus juris* of the states in much the way that a state legislature acts against the background of the common law, assumed to govern unless changed by legislation. HART AND WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM, pp. 470-471 (2d ed., 1973).

There is no preemption unless Congress has (1) clearly expressed it, or (2) unless the "nature of the regulated subject matter permits *no other conclusion but preemption of state power.*" Emphasis ours. *Florida Lime and Avocado Growers, Inc. v. Paul,* 373 U.S. 132, 142, 83 S.Ct. 1210, 10 L.Ed.2d 1210 (1963).

Reference to the general history, the legislative history, the relevant legislation and case gloss all clearly show that the subject matter regulated by the original Lands Act, and as amended, is the oil and gas and other mineral resources lying in the soil and seabed of the offshore waters. See President Truman's Veto Message, 1952 U.S. CODE CONG. & AD. NEWS 908-913; H. R. Rep. No. 215 to accompany H. R. 4198, 83rd Cong., 1st Sess. (1953); U.S. CODE CONG. & AD. NEWS 1385; H. R. Rep. No. 413 to accompany H. R. 5134 which became the Outer Continental Shelf Lands Act, 1953 U.S. CODE CONG. & AD.

NEWS 2177; *Guess v. Read,* 290 F.2d 622 (5th Cir. 1961, cert. den. 368 U.S. 957); *Treasure Salvors v. Unidentified Wrecked Etc.,* 569 F.2d 330 (5th Cir. 1978); *United States v. Alexander,* 602 F.2d 1228 (5th Cir. 1979).

The intent of the Lands Act is to cut off state interests in "the lands, minerals and other natural resources more than three geographic miles from the coastline of that state," and to entitle the United States to those lands, minerals and resources. *United States v. Florida,* 425 U.S. 791, 96 S.Ct. 1840, 48 L.Ed.2d 388 (1976).

A limited construction of the Lands Act comports with its "primary purpose of resolving competing claims to the ownership of the natural resources of the offshore seabed and subsoil." *Treasure Salvors v. Unidentified Wrecked Etc., supra,* at p. 339.

> [A]n extension of jurisdiction for purposes of controlling exploitation of the natural resources of the continental shelf is not necessarily an extension of sovereignty. *Id.*

The Lands Act grant of jurisdiction to the United States district courts must be construed narrowly in light of the overall purpose of the Act, which is to lease for mineral development. *United States v. Alexander, supra,* at p. 1231.

The Lands Act as a whole does not expressly preempt state court jurisdiction over this tort case, nor does it imply preemption under the *Paul* test, *supra,* since such jurisdiction in no way affects U.S. ownership and control of the lands, seabed, and subsoil of the Outer Continental Shelf.

II.

NORFOLK AND WESTERN RAILWAY COMPANY V. LIEPELT, 100 S.CT. 755 (1980) IS NOT APPLICABLE TO THIS CASE

1. Liepelt Is a FELA Wrongful Death Case and Does Not Apply to the Case at Bar, a Common Law Negligence Case For Personal Injury

The case at bar is a common law negligence case for personal injury; *Liepelt* was a statutory FELA wrongful death case, and compensable damages differ in each. Under the Lands Act, Gaedecke's common law cause of action for personal injuries against a nonemployer negligent tortfeasor is governed by the law of the state adjacent to the fixed drilling platform ("fixed structure") on which Gaedecke worked for Gulf. This is Louisana. Original 1953 Lands Act, 43 U.S.C. § 1333(a)(2), and as amended in 1978, 43 U.S.C. § 1333(a)(2)(A). Such state law is "surrogate federal law." *Rodrique v. Aetna Casualty Company,* 395 U.S. 352, 365, 89 S.Ct. 1835, 23 L.Ed.2d 360 (1969).

The case at bar is the equivalent of a Louisiana tort case governed by Louisiana law. See *Moczygemba v. Danos & Curiole Marine Contractors,* 561 F.2d 1149, 1151 (5th Cir. 1977). Thus it does not follow that a court applying Louisiana law in a case for damages for common law negligence resulting in personal injuries must adopt statutory federal law as the measure of damages. To apply FELA jury instructions as to federal income tax in a case governed by Louisiana law, particularly without even knowing what Louisiana law is, would violate this Court's admonition "That federal courts should not create interstitial federal common law

when the Congress has directed that a *whole body* of state law shall apply." *Chevron Oil Company v. Huson,* 404 U.S. 97, 104, 92 S.Ct. 349, 30 L.Ed. 296.

Liepelt stands only for the limited proposition that the measure of damages under a congressionally created cause of action for wrongful death, an action not known at common law,[4] is governed by the terms of the statute creating the cause of action and which defines specifically the measure of damages.

There is no congressional statute in this lawsuit which purports to create the cause of action for personal injuries instituted by Gaedecke, much less prescribe his measure of damages. Certainly, there is not one word in the Lands Act, and petitioner cites none, that gives Gaedecke his cause of action for personal injuries in this case. And that is where petitioner stumbles—by believing that the Lands Act created Gaedecke's cause of action (Pet. for Cert., p. 18). Instead we have a clear case of *casus omissus.*

A common law cause of action is one that does not rest for its authority upon any express statute, but upon the decisions of the courts. *Kansas v. Oklahoma,* 306 U.S. 655, 696, 27 S.Ct. 655, 667 (1906); *Western Union Teleg. Co. v. Case Publishing Co.,* 181 U.S. 92, 101, 102, 21 S.Ct. 561 (1901).

The Texas district court, following Texas procedural rules,[5] correctly presumed, in the absence of any tender

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4. Gonzales v. Succession of Medica, 141 So.2d 887, (La. App. 1962); Farmers' and Mechanics' Nat. Bank v. Hanks, 137 S.W. 1120, 1122 (Tex. 1911); Conway v. Chemical Leaman Tank Lines, Inc., 540 F.2d 837, 839 (5th Cir. 1976).

5. As to the need to follow Texas procedural rules in this case, see pp. 2-4, supra.

of any proof of Louisiana law on either negligence or measure of damages for personal injuries, that Louisiana law was the same as Texas law. Tex. R. Civ. P. 184(a), (Appendix C); *Gevinson v. Manhattan Const. Co. of Oklahoma,* 449 S.W.2d 458, 465, n.2 (Tex. 1969). Thus, following *Turner v. General Motors,* 584 S.W.2d 844, 853 (Tex. 1979) it refused to instruct the jury that income tax consequences of its award of damages should not be considered.

2. As No Evidence Regarding Federal Income Tax was Introduced By Gulf, Liepelt Is Inapplicable to the Case at Bar.

In *Liepelt,* this Court of necessity restricted itself to the facts before it and decided that the jury's verdict was, *under the evidence,* excessive. Liepelt's expert (an economist), using gross earnings without any deduction for income taxes, produced a damage total reduced to present value of $302,000 (100 S.Ct. at 756). The railroad objected to this evidence and offered to prove by its own expert (an actuary) that taking into account decedent's federal income taxes, and making different assumptions, that the net pecuniary loss was $138,327. The jury returned a verdict of $755,000! (100 S.Ct. at 756, 757).

The railroad argued that the jury must have assumed that the award was subject to federal income taxation; otherwise, the verdict would not have exceeded even plaintiff's own expert's opinion by such a large margin—almost a half million dollars (100 S.Ct. at 757). This Court held that the evidence of "estimated after-tax earnings" should have been admitted (100 S.Ct. at 758). It *then* held that the jury should have been instructed not to

consider income taxes in fixing the amount of its verdict "in this case" (100 S.Ct. at 759).

This decision, based on an assumption as to why the jury overran plaintiff's damage evidence by almost a half million dollars, does *not* apply to the present common law personal injury case where Gulf made no effort to introduce any evidence whatsoever of Gaedecke's estimated after-tax earnings.

Liepelt clearly holds that, except in cases of *de minimus,* evidence of the impact of future income tax in calculating an award is required if the jury is to be instructed that federal income tax should not be considered in fixing the amount of the award (100 S.Ct. at 758 and n.7). The Court gives these assuring words to trial judges and counsel:

> * * * But the practical wisdom of the trial bar and the trial bench has developed effective methods of presenting the essential elements of an *expert calculation* in a form that is understandable by juries that are increasingly familiar with the complexities of modern life. * * * (100 S.Ct. at 758). (Emphasis ours).

However, Gulf presented nothing to the jury in the nature of "an expert calculation," and submitted its Requested Jury Instruction C *without any evidence whatsoever* on which to base it.[6]

The admonitory instruction not to consider income taxes in making a damage award was given in *Liepelt* only after it was raised by evidence.

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6. As we have demonstrated above (pp. 3, 4) Texas practice did not permit Gulf to have its Requested Instruction C on federal income tax submitted to the jury without evidence to support it.

3. Liepelt Cannot Be Retroactive Except in FELA Cases

The two cases cited by Gulf as to the retroactive application of *Liepelt—Lang v. Texas Pacific Railway Co.*, 624 F.2d 1275 (5th Cir. 1980) and *Cazad v. Chesapeake & Ohio Railway*, 622 F.2d 72 (4th Cir. 1980), (Pet. for Cert., p. 18, 19)—are not *deux ex machina*. Alas, both are FELA cases applying federal, not state law.

CONCLUSION

For the reasons stated, the petition should be denied.

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CERTIFICATE OF SERVICE

I, Joseph D. Jamail, a member of the bar of this Court and counsel for Steven Gaedecke, hereby certify that

(1) all parties required to be served in this proceeding have been served,

(2) Three copies of the foregoing Brief in Opposition of Steven Gaedecke were served on counsel for each of the other parties separately represented in this proceeding at their respective post office addresses, viz.,

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(3) Service on each of such parties was made on October 31, 1980, by depositing said copies of this Brief in Opposition in a United States Post Office, first class postage prepaid, and addressed to the above-named counsel at their respective post office addresses listed above.

JOSEPH D. JAMAIL

APPENDIX A

2A Vernon's Texas Rules of Civil Procedure, p. 460 (1976)

Rule 276. Refusal or Modification

When an instruction, special issue, definition or explanatory instruction is requested and the provisions of the law have been complied with and the trial judge refuses the same, he shall indorse thereon "Refused," and sign the same officially. If the trial judge modifies the same he shall indorse thereon "Modified as follows: (stating in what particular he has modified the same) and given, and exception allowed" and sign the same officially. Such refused or modified instruction, special issue, definition or explanatory instruction, when so indorsed shall constitute a bill of exceptions, and it shall be conclusively presumed that the party asking the same presented it at the proper time, excepted to its refusal or modification, and that all the requirements of law have been observed, and such procedure shall entitle the party requesting the same to have the action of the trial judge thereon reviewed without preparing a formal bill of exceptions.

APPENDIX B

THIRD PARTY DEFENDANT'S REQUESTED INSTRUCTIONS A, B AND C. FILED: November 22, 1978. Ray Hardy, District Clerk, Harris County, Texas. By. R. Trinkle, Deputy.

Requested Instruction No. A

In connection with the damage issues, you are instructed that any amounts allowed for:

a) physical pain and mental anguish in the future, and

b) loss of earning capacity in the future, and

c) loss of physical capacity in the future, and

d) medical and hospital care in the future,

must be such amounts as are the present value thereof, and reduced to such present value by the use of an appropriate interest rate, prevailing at the time and place of trial, at which money can be safely and securely invested, and the balance shall be your answer.

REQUESTED INSTRUCTION NO. B

In considering the issues submitted by the Court dealing with the question of amount of damages sustained by Stephen Gaedecke, if any, you are instructed that you are not to consider or speculate concerning future inflationary trends or possible future increases in earnings due to increases in productivity, that is you shall not speculate in projection of future damages, if any, about possible future inflationary trends or possible depressions or about possible future wage increases.

Requested Instruction No. C

You are instructed that, as a matter of law, any award made to the plaintiff in this case, if any is made, is not income to the plaintiff within the meaning of the Federal Income Tax Law. In determining damages sustained by plaintiff, if any, you are to follow the instructions already given you by this court in measuring those damages and in no event should you either add to or subtract from that award on account of such damages not being subject to federal income taxes.

APPENDIX C

2 Vernon's Texas Rules of Civil Procedure,
p. 488 (1976)

Rule 184a. Judicial Notice of Law of Other States, Etc.

The judge upon the motion of either party shall take judicial notice of the common law, public statutes, and court decisions of every other state, territory, or jurisdiction of the United States. Any party requesting that judicial notice be taken of such matter shall furnish the judge sufficient information to enable him properly to comply with the request, and shall give each adverse party such notice, if any, as the judge may deem necessary, to enable the adverse party fairly to prepare to meet the request. The rulings of the judge on such matters shall be subject to review.